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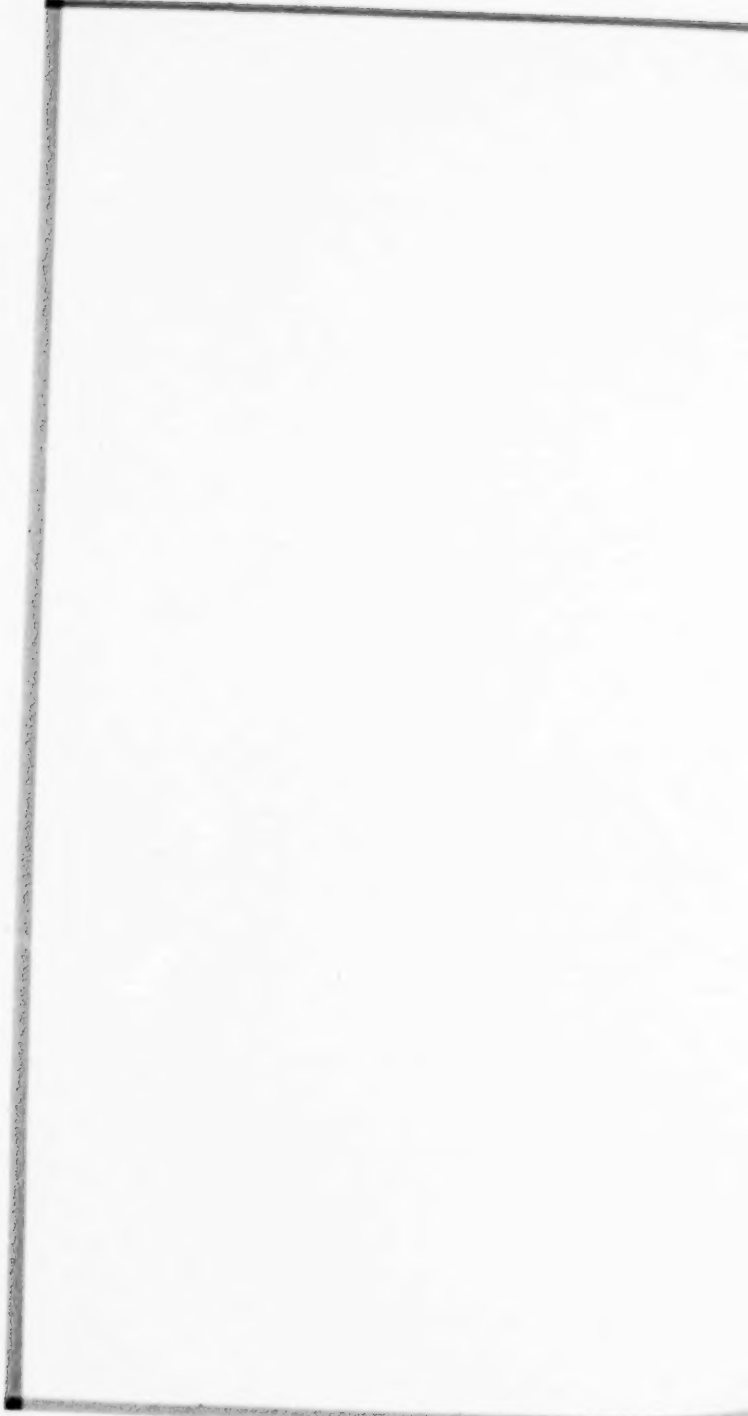

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 188

UNITED CONSTRUCTION WORKERS, AFFILIATED WITH THE UNITED MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

LABURNUM CONSTRUCTION CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Solicitor General files this memorandum, on behalf of the National Labor Relations Board, in response to the invitation of the Court "to submit a memorandum setting forth the policy of the Board in regard to: (1) the proviso in Section 10 (a) [of the National Labor Relations Act]; and (2) other cases, apart from those in Section 10 (a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the

Board declines to act and whether the standards are applied by rule or regulation or on a case-by-case method." 346 U. S. 936.

1. *The Board's policy in regard to the Section 10 (a) proviso.* The proviso to Section 10 (a) empowers the Board

> by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is the Board's view that the proviso bars it from ceding jurisdiction to state regulatory agencies unless they are enforcing legislation substantially identical with the national Act. *Hearings before the Joint Committee on Labor-Management Relations,* 80th Cong., 2d Sess., Part 2, pp. 1125, 1143; *Kaiser-Frazer Parts Corp.,* 80 N. L. R. B. 1050, 1051–1052; *Sears Roebuck & Co.,* 91 N. L. R. B. 1411, n. 2; *L. Wiemann & Co.,* 106 N. L. R. B. No. 190, 32 L. R. R. M. 1640.[1]

[1] The Board's interpretation of the limitation placed upon its authority to cede jurisdiction has been recognized, and

Following the enactment of the proviso in 1947, the Board, through its General Counsel, held conferences with various state representatives with a view to determining the feasibility of consummating agreements ceding jurisdiction to these states, pursuant to the proviso. At that time, the Board found it impossible to negotiate such agreements because of a failure to satisfy the statutory requirement that the relevant state or territorial law must not be "inconsistent" with the corresponding provision of the national Act or have received a construction "inconsistent therewith." N. L. R. B., *Thirteenth Annual Report* (Govt. Print. Off. 1949) p. 18. Since these initial efforts, the Board has continued to find it not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction. Accordingly, it has entered into no such agreement with any state or territorial agency. *Hearings before the Senate Committee on Labor and Public Welfare, Taft-Hartley Act Revisions,* 83d Cong., 1st Sess., Part 4, pp. 2103, 2122–2123.[2]

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concurred in, by the Joint Committee on Labor-Management Relations which was established by Congress to study the operation of the amended Act. *Report of the Joint Committee on Labor-Management Relations*, S. Rept. No. 986, Part 1, 80th Cong., 2d Sess., pp. 30–31. See also, S. Rept. No. 105, 80th Cong., 1st Sess., p. 26; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 52; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397–398, n. 23.

[2] In 1949, a bill was introduced in the Senate (S. 249, 81st Cong., 1st Sess.) to amend the Taft-Hartley Act in various

2. *The Board's jurisdictional standards.* The Board's authority in the area in which it operates is, as decisions of this Court have recognized, coextensive with the federal power to regulate interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1; *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643. Despite the breadth of its statutory authority, the Board has, however, long taken the position that it would better effectuate the purposes of the Act "not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to

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respects. The majority report accompanying this bill observed with respect to the Section 10 (a) proviso (S. Rept. No. 99, 81st Cong., 1st Sess., Part 1, p. 43):

"The proviso to section 10 (a) of the act was intended to permit the Board to allow State and Territorial labor relations boards to exercise final jurisdiction over cases involving border-line employers, provided the State or Territorial statute conforms to national policy. Far from achieving its purpose of enabling the cession of cases, the proviso has had the opposite effect. It has prevented any cession at all, because no State or Territory has enacted a labor-relations statute consistent with the Taft-Hartley Act."

Subsequently, at the same session of Congress, Senator Taft introduced a bill which, *inter alia,* was designed to eliminate the proviso to Section 10 (a) (95 Cong. Rec. 8716–8717). In the report on this bill, Senator Taft observed (S. Rept. No. 99, 81st Cong., 1st Sess., Part 2, p. 8):

"The Board has not been able to cede jurisdiction to any State agency since passage of the act. The limitation of 'consistency' has prevented agreement since no State has enacted a statute modeled after the act."

Neither proposal to eliminate the proviso became law.

limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635, 636. The Board's abstention from exercising the full measure of its statutory jurisdiction has been prompted, in general, by a policy to utilize its limited budget and personnel in the processing of cases which individually or in the aggregate present, in relation to the Board's potential case-load, the most serious threat to interstate commerce.[3]

Prior to 1950, the Board followed a case by case method in determining whether to exercise its statutory jurisdiction over the particular enterprise involved. In October of that year, however, the Board concluded that "the time [had] come * * * when experience warrants the establishment and announcement of certain standards" to govern the future exercise of its statutory authority. *Hollow Tree Lumber Co., supra.* Accordingly, in October 1950, the Board issued a series of decisions in several representation proceedings setting forth nine general jurisdictional standards on the basis of which it would determine in future representation or unfair labor practice cases whether or not to exercise its statutory jurisdiction over the particular enterprise involved in a

[3] *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., p. 120.

case.[4] These decisions announced that the Board would in the future take jurisdiction over cases involving enterprises in the following categories:[5]

1. Instrumentalities and channels of commerce, interstate or foreign.[6]

2. Public utility and transit systems.[7]

3. Establishments operating as an integral part of a multistate enterprise.[8]

4. Enterprises producing or handling goods destined for out-of-State shipment, or performing services outside the State in which the firm is located, valued at $25,000 a year.[9]

5. Enterprises furnishing goods or services of $50,000 a year or more to concerns in categories 1, 2, or 4.[10]

6. Enterprises with a direct inflow of goods or materials from out-of-State valued at $500,000 a year.[11]

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[4] These general standards were also summarized and published in a Board press release (No. 342) issued on October 6, 1950.

[5] This Court has taken notice of the jurisdictional standards adopted by the Board in 1950. *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 685; *Amalgamated Association, etc.* v. *W. E. R. B.*, 340 U. S. 383, 392.

[6] *W. B. S. R., Inc.*, 91 N. L. R. B. 630.

[7] *Local Transit Lines*, 91 N. L. R. B. 623.

[8] *The Borden Co.*, 91 N. L. R. B. 628.

[9] *Stanislaus Implement and Hardware Co.*, 91 N. L. R. B. 618.

[10] *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635.

[11] *Federal Dairy Co., Inc.*, 91 N. L. R. B. 638.

7. Enterprises with an indirect inflow of goods or materials valued at $1,000,000 a year.[12]

8. Enterprises having such a combination of inflow or outflow of goods or services, coming within categories 4, 5, 6, or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100.[13]

9. Establishments substantially affecting the national defense.[14]

During the several years following the adoption of the foregoing jurisdictional yardsticks, the Board has determined on a case to case basis whether the particular enterprise involved in the case satisfied those criteria so as to warrant the Board's exercise of its statutory power. N. L. R. B., *Sixteenth Annual Report* (Govt. Print. Off. 1952) pp. 23–34; N. L. R. B., *Seventeenth Annual Report* (Govt. Print. Off. 1953) pp. 12–19. Presently, however, the Board is contemplating a comprehensive reexamination of its jurisdictional criteria in the light of its intervening experience. Meanwhile, the Board in a series of recent decisions has taken the position that it will not continue to exercise its legal jurisdiction over *all* enterprises which under earlier Board decisions might have been regarded as falling within categories 2, 5 or 9 established by the 1950 standards. Thus, the Board has ruled that it will not continue

[12] *Dorn's House of Miracles, Inc.*, 91 N. L. R. B. 632.
[13] *The Rutledge Paper Products, Inc.*, 91 N. L. R. B. 625.
[14] *Westport Moving & Storage Co.*, 91 N. L. R. B. 902.

to exercise jurisdiction over such public utilities as rural electric cooperatives which are essentially local in character,[15] or local transit or transportation systems,[16] or enterprises which, although performing services in connection with interstate instrumentalities, or performing services for concerns falling in categories 1, 2 or 4, have a comparatively remote or insubstantial impact upon commerce.[17] The Board has also ruled that in exercising jurisdiction over establishments affecting national defense, it will require a showing of a more direct and substantial relationship to the national defense than it had required in earlier cases.[18] As to enterprises covered by the other categories, the Board, pending the results of further study, is, in general, continuing to apply those standards, as it has in the past, for the purpose of determining

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[15] *Inter-County Rural Electric Cooperative Corp.*, 106 N. L. R. B. No. 238, 33 L. R. R. M. 1010.

[16] *San Jose City Lines*, 106 N. L. R. B. No. 201, 32 L. R. R. M. 1644; *Auburn Bus Co.*, 107 N. L. R. B. No. 182, 33 L. R. R. M. 1261.

[17] *Checker Taxi Co.*, 107 N. L. R. B. No. 85, 33 L. R. R. M. 1119; *Checker Taxi Co.*, 107 N. L. R. B. No. 181, 33 L. R. R. M. 1261; *Brooks Wood Products*, 107 N. L. R. B. No. 71, 33 L. R. R. M. 1104; *Casey Welding Works*, 107 N. L. R. B. No. 185, 33 L. R. R. M. 1272; *American Coin Lock Co.*, 107 N. L. R. B. No. 88, 33 L. R. R. M. 1135.

[18] *Taichert's, Inc.*, 107 N. L. R. B. No. 167, 33 L. R. R. M. 1240; *McArthur Jersey Farm Dairy*, 107 N. L. R. B. No. 171, 33 L. R. R. M. 1260; *Alpine Mill & Lumber Co.*, 107 N. L. R. B. No. 172, 33 L. R. R. M. 1264; *Ideal Laundry & Dry Cleaners*, 107 N. L. R. B. No. 186, 33 L. R. R. M. 1271; *Casey Welding Works*, 107 N. L. R. B. No. 185, 33 L. R. R. M. 1272.

whether to assert jurisdiction over such enterprises.

Under the standards which the Board is currently continuing to apply, it would assert jurisdiction over an enterprise similar to respondent company herein. Respondent is a Virginia corporation, with its principal office in Richmond, specializing in industrial construction work. From May 1942 to December 1949, it performed work in several states amounting to more than 20 million dollars. Its annual volume of business averages more than 2 million dollars. Its out-of-state work in 1949 exceeded $452,000 (R. 72, 426). From September 1947 to December 1949, the company performed services valued in excess of $650,000 for the Pond Creek Pocahontas Co. and the Island Creek Coal Co. (R. 36, 87–88, 458), which together constitute the third largest commercial coal producing unit in the United States. The coal produced by these companies, valued at more than 50 million dollars, is distributed and sold in almost every state east of the Mississippi and others.[19] Upon these facts, the Board would take jurisdiction over Laburnum under category 4 or 5 or both. *Eastern Iron & Metal Co.*, 106 N. L. R. B. No. 220, 32 L. R. R. M. 1671; *South Texas Chapter, Associated General Contractors*, 107 N. L. R. B. No. 190; *Cement Masons Local No. 555*, 102 N. L. R. B. 1408;

[19] Moody's Industrials (1953) pp. 1033, 1126–1127; Standard & Poors Corporation Records, pp. 2769, 9981–9982.

Local No. 63, 106 N. L. R. B. No. 46, 32 L. R. R. M. 1452; *Charles E. Daboll, Jr.*, 105 N. L. R. B. No. 44, 32 L. R. R. M. 1283.

3. *The Board's policy as to state action in situations where the Board declines to exercise jurisdiction.* The Act, generally speaking, establishes an exclusive pattern of regulation of labor relations in all industries whose operations substantially affect interstate commerce. It is well settled that, with some exceptions, the States may not establish their own pattern of labor relations in interstate industries over which the Board regularly asserts its statutory jurisdiction.[20] However, as we have stated above, the Board for policy reasons has declined to assert jurisdiction over enterprises whose operations, although within the coverage of the Act, do not satisfy the Board's administrative jurisdictional yardsticks. This Court has noted but not passed upon[21] the question whether the States, in the absence of an agreement with the Board ceding jurisdiction to them, may act with respect to interstate industries over which the Board has but declines to assert jurisdiction.

The Board has not formally decided or otherwise taken a position on this question in any

[20] *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953; *Garner* v. *Teamsters Union*, 346 U. S. 485; *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.

[21] *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.

case or litigation in which it has been involved. It has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service,* 99 N. L. R. B. 498, 500–501.[22]

The Board recognizes, of course, as this Court recently stated in *Garner* v. *Teamsters, etc. Union,* 346 U. S. 485, 488, that under the Act the states "still may exercise '[their] historic powers over such traditionally local matters as public safety and order and the use of streets and highways.'" Appearing before the Senate Committee on Labor and Public Welfare in 1953 the Board's then Chairman (Mr. Herzog) stated, "There are, of course, aspects of labor controversies which the States have traditionally been free to control. Although earlier witnesses have apparently sought to convey a con-

[22] The Board's practice in this respect is reflected in its action in *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749 (S. D. N. Y.). There the Board sought to enjoin the New York State Labor Relations Board from taking jurisdiction over certain taxicab companies over which the Board had asserted jurisdiction. While the case was pending, the Board reconsidered its jurisdictional policy with respect to taxicab companies and concluded that it would refrain from asserting jurisdiction over the type of companies involved in the action against the New York Board. Following this change of policy, the National Board entered into a stipulation with the State Board dismissing the action in the district court.

trary impression, the Labor-Management Relations Act of 1947 has not cut into that freedom We speak of the inherent police power of each sovereign State to deal with acts of violence or other threats to the peace." *Hearings before Senate Committee on Labor and Public Welfare, Taft-Hartley Act Revisions,* 83d Cong., 1st Sess., Part 4, pp. 2123–2124, 2107. This statement continues to represent the Board's present views.

Although recognizing the States' authority to exercise their traditional police powers in situations arising out of labor disputes, the Board does not, however, regard itself in proceedings before it as bound by the determination which a state court may make as to the legality or purpose of concerted action by employees for mutual aid or protection. *H. N. Thayer Co.,* 99 N. L. R. B. 1122, 1128–1131.

Respectfully submitted,

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